

WILLIAM J. MITCHELL JR.  
v.  
DEPARTMENT OF THE NAVY

Docket No.  
PH075209113

### OPINION AND ORDER

The appellant was removed for failing to complete a "Report of Medical History," for not reporting for a medical examination as directed and for failing to comply with a subsequent directive to report to complete the form and the medical examination. He appealed to the Philadelphia Field Office raising several procedural and substantive arguments. The presiding official found that the agency action was supported by a preponderance of the evidence and that there was no procedural error. He affirmed the agency action. In his petition for review, the appellant reiterates the arguments he had previously submitted. Because he neither establishes that new and material evidence is available that was not available when the record was closed nor that the decision of the presiding official was based on an erroneous interpretation of statute or regulation, we find that his petition for review does not meet the criteria for review set forth at 5 C.F.R. § 1201.115 and we hereby DENY the petition.

Appellant alleges for the first time in his petition for review that he is handicapped and that he was the victim of discrimination based on his handicapping condition. Because the Board is more amenable to considering allegations of discrimination prohibited by statute raised for the first time in a petition for review than other allegations of error, we hereby reopen the appeal on our own motion to consider appellant's claim. 5 C.F.R. § 1201.117.

Discrimination based upon a handicapping condition is a prohibited personnel practice pursuant to 5 U.S.C. § 2302(b) (1) (D), and if the agency decision was based on such practice the agency action must fail. 5 U.S.C. § 7701(c) (2). It is, however, incumbent upon the appellant to establish that the decision was based on such prohibited personnel practice as an affirmative defense. 5 C.F.R. § 1201.56(b) (2). The appellant in the instant appeal has presented no evidence beyond his bare assertions regarding alleged discrimination against him. Therefore we find that appellant has not shown that his discharge was the result of handicap discrimination. Accordingly, the initial decision is affirmed as modified.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on

the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE  
for ROBERT E. TAYLOR,  
*Secretary.*

WASHINGTON, D.C., *May 22, 1981*